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FEDERAL COMMUNICATIONS COMMISSION

Before the

AUG 9 1994

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules to Establish New Personal
Communications Services

) GEN Docket No. 90-314
) ET Docket No. 92-100/
)
) RM-7140, RM-7175, RM-7617
) RM-7618, RM-7760, RM-7782
) RM-7860, RM-7977, RM-7978,
) RM-7979, RM-7980
)
) PP-35 through PP-40, PP-79
) through PP-85

**POST-AUCTION COMMENTS AND RECOMMENDATIONS OF
ESSENCE COMMUNICATIONS INC.**

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INTRODUCTION

Essence Television Production, Inc. ("Essence")¹, through counsel, hereby files Supplemental Comments in the above proceeding. Essence, a Designated Entity, was a participant in the Federal Communication Commission's (FCC) auction for national narrowband Personal Communications Services (PCS) licenses.

ESSENCE

Founded nearly 25 years ago, Essence Communications, Inc. is one of the country's leading minority-owned enterprises, currently ranking in the top 20 of "Black Enterprise Top 100 Companies". Its corporate offices are located in New York City. Among its shareholders and board of directors are: Ed Lewis, Clarence Smith, Camille Cosby, J. Bruce Llewellyn, Frank Savage, Jim Dowdy, Maxine Waters and Nat Lehrman. Many of these individuals have substantial ownership interest in television and cable properties. Essence Communications publishes a monthly magazine, Essence, with a circulation of approximately one million. Essence Communications publishes another monthly magazine entitled Income Opportunities, which has over four hundred thousand readers and focuses on entrepreneurial opportunities in emerging technology. Essence Communications also produced a weekly television show for a number of years, and for the past seven years has hosted and produced a two hour prime-time network televised awards special profiling prominent entertainers and leaders in the African-American community.

¹Essence Television Productions, Inc., a wholly-owned subsidiary of Essence Communications, Inc., was the applicant of record in the national narrowband PCS auction.

Essence sought to expand its involvement in telecommunications by bidding in the national narrowband PCS auction. Like all other designated entity participants, Essence failed in its attempt to acquire spectrum in any of the ten blocks, including the three that provided designated entity incentives. Although Essence did not acquire a license, it did gain substantial knowledge and insight into the auction process. Based on this experience, Essence offers the following observations and recommendations for designated entity incentives for future narrowband auctions. These points can be summarized as follows:

- 1) Reserved Blocks - Designated entities should have reserved blocks in which they would be able to compete solely amongst themselves.
- 2) First Option - A "First Option" program, in which women and minorities would have the first opportunity to bid on certain parts of the spectrum, should be implemented.
- 3) Bidding Credit - A bidding credit of 40% of the auction price should be extended to designated entities.
- 4) Minimum Ownership - The minimum ownership requirement should be reduced from 51% to 40% to be consistent with the bidding credit.
- 5) Merger Opportunities - Designated entities should have the flexibility to merge with other auction participants and bring in additional investors or equity partners during the auction process, so long as such changes do not create a change of control.
- 6) Tax Incentives - The tax certificate incentive should be extended to allow benefits during the operation of the telecommunications facility and not just after the sale of the system.

DISCUSSION

The auctioning of spectrum space provides the government with an opportunity to undertake one of the largest and most significant public policy initiatives in history, and to remedy, in part, the dearth of representation by women and minorities in the field of

telecommunications. The first of the auctions was for PCS, an industry projected to evolve into a multi-billion dollar market. By June 27, 1994, sixty-seven applications were received for the first national narrowband spectrum auctions; by July 14, 1994, twenty-nine final applicants (including at least six minority- or women-owned businesses) were approved to participate. Each applicant submitted at least \$350,000 per license as an initial deposit. Essence Communications deposited \$700,000. PCS is expected to compete with the existing cellular, paging, data transmission and private advanced mobile communications services. Along with developing technology that includes transmission of voice and data, PCS has video originating applications which includes potential hybrid technology that will incorporate both image and voice. The services can be easily expanded into programming origination and transmission similar to that authorized in the Videodialtone proceedings. See Application of Bell Atlantic (FCC 94-180, Order and Authorization, July 5, 1994). The potential for the licensees of this technology is limitless.

The FCC has adopted procedures by which to implement the Congressional mandate to ensure that designated entities (minorities, women and small businesses) are given the "opportunity to participate in the provision of spectrum based services". 47 U.S.C.

§ 309(j)(4)(D). FCC Chairman Reed E. Hundt recently cited dismal statistics in a July 26, 1994 speech to the National Urban League:

- Of approximately 98,000 telecommunications firms, only about 490 (.5%) are minority-owned.
- Of over 10,000 commercial broadcast radio and television stations, only 300 (3%) are minority controlled.
- Of an estimated 7,500 cable operators, nine (.01%) are minority controlled.

- Of nearly 1700 electronic computing equipment manufacturers, only one (.005%) of these companies is owned by an African-American.

The fact that for some 50 years lucrative broadcast licenses were awarded free of charge to entities that rarely included women- or minority-owned businesses has contributed to the competitive disadvantage designated entities experienced in the PCS auctions. To ensure diversity and economic empowerment, minority owned companies desiring to provide spectrum based services, must be provided enhancements to overcome the headstart obtained by major telecommunications conglomerates over the last 50 years.

Although the first narrowband auction exceeded most industry revenue projections, the FCC's effort to diversify the telecommunications field via the auctions was unsuccessful. The result of the attempted implementation of the Congressional mandate was inadequate and the desire to generate competition for securing licenses ultimately defeated compelling public policy interests. In the national narrowband auction, none of the designated entities were successful in their efforts to obtain any of the ten national narrowband PCS licenses and the participation of minorities and women was ultimately reduced to that of spectator status during the final round of the auction. In the ensuing Interactive Video Data Services auction the results, though somewhat better, were also disappointing.

RECOMMENDATIONS

The purpose of this submission is to offer constructive and reasonable proposals to ensure that those who are under-represented in the field of telecommunications are provided with fair prospects to participate in this momentous societal and economic opportunity. The following are a list of recommendations that the Commission should consider prior to conducting additional PCS auctions.

1. Reservation Blocks

When enacting the spectrum auction regulations, Congress sought to avoid "excessive concentration" of spectrum ownership by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. . ." 47 U.S.C. § 309(j)(3)(B). The most logical means of diversifying ownership of the spectrum blocks is by reserving segments in which designated entities would compete primarily among themselves. The reservation of spectrum blocks in this manner is an appropriate public policy that would be constitutionally permissible. The Commission has adopted a similar procedure in its broadband PCS auctions, therefore, Essence recommends that the Commission apply a similar concept for the upcoming narrowband auctions.

A few years ago, the Supreme Court in Astroline Communications Company v. Shurburg, 497 U.S. 547 (1990) ("Astroline") upheld as constitutional the Commission's policy of permitting minorities to purchase stations that otherwise could not be sold because the seller's license was in jeopardy due to questionable broadcast operations. This "distress sale policy" effectively isolated a few broadcast properties that could only be acquired by qualified minority buyers. The Court held that benign, race-conscious measures mandated by Congress--even those measures not "remedial" in the sense of being adopted to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. Id. at 564-565.

Reserving spectrum blocks for designated entities in PCS auctions meets the standards as established in Astroline. Furthermore, the Court has held that the promotion of economic opportunity for historically disadvantaged groups is a valid Congressional objective. Fullilove v. Klutznick, 448 U.S. 448 (1979) (upholding Congressional minority set-asides in construction contracts). By reserving blocks, the FCC would be serving the same governmental interest in promoting economic opportunities for minorities.

2. "First Option" Program

A more moderate, but less desirable, alternative to the reservation block proposal is the "First Option" program. A "First Option" program, analogous to a "right of first refusal", would establish a minimum bid for a limited number of spectrum bands for designated entities. Under this proposal designated entities would have the first opportunity to bid on the spectrum; if they fail to meet the threshold auction price, or fail to bid at all, the spectrum space would be open to all bidders. This program has precedent in the FCC's clear channel proceedings and A.M. daytime proceedings. 47 U.S.C.A. § 331(a)(1994)(ensures that not less than one high frequency commercial television channel is allocated to each state); 47 U.S.C.A. § 316(a)(1) (1994) (a station license or construction permit may be modified if the action promotes the public interest, convenience and necessity). It would also ensure that all spectrum space for PCS technology is procured and effectively utilized in a timely fashion.

3. Bidding Credits

In all markets, designated entities should receive bidding credits of up to 40% of the bidding price. Minorities and women have been historically disadvantaged in their access to capital markets, therefore, significant bidding credits must be implemented immediately. Minorities and women would then have a meaningful opportunity to compete against large telecommunication conglomerates that have had half a century of free licenses to build upon.

4. Minimum Ownership

The general requirement of the national narrowband auction that the designated entity own at least 51% of the enterprise in order to receive incentives, prevents mergers and joint ventures. To balance the interests of independent partners, the ownership requirement should be consistent with the bidding credit. In other words, with a 40% bidding credit, a designated entity should own a minimum of 40% and have voting control of the enterprise. This would spark more joint ventures between diverse businesses, while still ensuring that the designated entity maintains control and significant equity ownership in the company.

5. Merger Opportunities

Designated entities should be permitted to merge with other auction participants or otherwise alter their ownership structure during the auction process. As the rules currently are drafted, the ownership structure of each applicant is "frozen" at the time the applicant files its FCC Form 175. In its experience in the national narrowband auction, Essence received numerous offers for financing and equity after its FCC Form 175 was filed; many offers were

presented after the bidding began. Thus, in the future to increase their likelihood of success, designated entities should have the latitude to merge with other auction participants or bring in additional investors or equity partners during the auction process so long as such ownership amendments do not create a change of control.

6. Tax Incentives

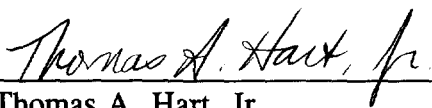
The FCC, in conjunction with the Internal Revenue Service, issues tax certificates to investors that provide minorities with start-up or acquisition capital or sell their ongoing facilities to minority-owned companies. These certificates are awarded at the time the investors sell or redeem their interest in the enterprise. The tax certificate policy has been very effective in sparking economic opportunities for minorities in broadcasting, however, this policy should be modified to make it more advantageous to telecommunications companies embarking on new technologies like PCS that require long-term capital investments and long-term operating strategies. Specifically, the tax incentive should be expanded so that it provides tax advantages not only to the equity investors in women- and minority-owned businesses but also more direct benefits to large companies that invest in these designated entities. The expansion should include tax benefits during the operation of the project, not just for resale. Using the framework of an enterprise zone or investment tax credit, designated entities making a profit with these systems should be exempt from paying taxes on the business for a specified period of time or should receive a meaningful discounted tax rate.

CONCLUSION

The Commission should consider the above mentioned recommendations as a package. They are not mutually exclusive. It is important that each of these recommendations be implemented promptly.

The FCC took a significant step toward remedying past and continued discrimination against minorities and women in the telecommunications field through a variety of incentives. However, the auction results dictate the need for more aggressive action to achieve the legitimate goals of a diversification policy. The FCC has before it a remarkable opportunity to institute regulations that would be a step towards reversing the effects of an institutionalized tradition of excluding and discriminating against minorities and women in business. The aforementioned incentives are decisive steps the FCC must take if it is to reach its objective of inclusive representation in the spectacular "Information Superhighway".

Respectfully submitted,



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